

# FRANCHISING, ARBITRATION, AND THE FUTURE OF THE CLASS ACTION

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## I. INTRODUCTION

In the late 1980s, filings of class actions declined to the point that some began to talk of their possible extinction. Paul Carrington was quoted in the *New York Times* as stating that “class actions had their day in the sun and kind of petered out.”<sup>1</sup> Stephen Yeazell reportedly “wondered aloud whether he had devoted his career to the study of a nearly-extinct species.”<sup>2</sup> Indeed, the number of class actions filed had been falling since the late 1970s, from over 2500 in 1978 to just over 500 in 1987.<sup>3</sup> But 1987 proved to be the low point. The number of class actions filed increased steadily thereafter, and by 2001 filings had risen to over 3000.<sup>4</sup>

In 2005, Myriam Gilles again forecast the demise of the class action. She wrote: “It is likely that, with a handful of exceptions, class actions will soon be virtually extinct.”<sup>5</sup> The leading culprit in this threatened extinction, according to Professor Gilles, is the arbitration

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<sup>1</sup>See Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7. The message of the *New York Times* article, consistent with the Carrington quote, was that class actions “appear to be dying.”

<sup>2</sup>Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 685 (1997) (describing remarks of Professor Stephen Yeazell at a meeting of the AALS Section of Civil Procedure in 1989).

<sup>3</sup>Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 JELS 459, 491 (2004).

<sup>4</sup>*Id.* The number of class actions filed fell to 2916 in 2002 and then to 2148 in 2003, but then increased to 2693 in 2004, the most recent year for which comparable data is available. See Administrative Office of the U.S. Courts, Annual Report of the Director, Table X-5 (2001-2004) (see [www.uscourts.gov/judbus2001/appendices/x05sep01.pdf](http://www.uscourts.gov/judbus2001/appendices/x05sep01.pdf); [www.uscourts.gov/judbus2004/appendices/x5.pdf](http://www.uscourts.gov/judbus2004/appendices/x5.pdf)).

<sup>5</sup>Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005).

clause.<sup>6</sup> An arbitration clause, when coupled with a clause waiving class arbitrations, acts as a “collective action waiver,” that, if enforced, would effectively eliminate the availability of class relief in court and in arbitration. She concluded: “Assuming the collective action waiver emerges more or less unscathed from the current round of judicial challenges, it is only a matter of time before these waivers metastasize throughout the body of corporate America and bar the majority of class actions as we know them.”<sup>7</sup>

In this article, we reexamine the future of the class action, with the benefit of several additional years of case law development and, perhaps, a different view of arbitration as a means of dispute resolution. A symposium on franchising is a particularly appropriate setting in which to undertake such a reexamination because of the important role of franchise arbitration clauses in the development of American arbitration law, in particular the law defining the relationship between arbitration and class actions. The first published opinion in which a court considered the possibility of class arbitration appears to have been the California Court of Appeals’ opinion in *Keating v. Superior Court*,<sup>8</sup> which arose out of a dispute between Southland Corporation and its (7-Eleven) franchisees.<sup>9</sup> Before the U.S. Supreme Court, the case became *Southland Corp. v. Keating*,<sup>10</sup> and is the leading case on the preemption of state law by the Federal Arbitration Act (FAA). Edward Wood Dunham, a franchise lawyer and a participant in this symposium, was one of the first commentators to note that an arbitration clause might serve as a “class action shield.”<sup>11</sup> He made his observation in an article describing how “the Subway franchisor, Doctor’s Associates, Inc. (DAI), employed an arbitration clause to block a state court class action.”<sup>12</sup> Other important developments in U.S. arbitration law likewise can be traced to the franchise or distributorship setting.<sup>13</sup>

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<sup>6</sup>Professor Gilles also noted the decline of the mass tort class action. *Id.* at 375. But the “more significant[]” reason for the feared extinction, according to Gilles, is the “collective action waiver.” *Id.* at 375-76.

<sup>7</sup>*Id.* at 377.

<sup>8</sup>*Keating v. Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), *vacated*, 645 P.2d 1192 (Cal. 1982), *rev’d on other grounds*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>9</sup>See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 38 (2000).

<sup>10</sup>465 U.S. 1 (1984).

<sup>11</sup>Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141 (1997).

<sup>12</sup>*Id.*

<sup>13</sup>For other examples, consider the following: (1) *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), which held that antitrust claims arising out of an international contract could be arbitrated, involved a contract between an automobile manufacturer (Mitsubishi) and a dealer (Soler); (2) the first federal statute to make certain pre-dispute arbitration clauses unenforceable applied to motor vehicle

Based on our reexamination, we do not see the class action as likely to become extinct, or even to appear on the endangered species list. Certainly the raw numbers do not provide evidence of any imminent “demise” of the class action. The number of class action filings is nowhere near the low reached in 1987.<sup>14</sup> Indeed, the available empirical evidence suggests that total class action filings may be increasing, although the evidence is by no means definitive. At a minimum, however, the empirical evidence certainly does not reveal any imminent extinction of the class action.<sup>15</sup>

More fundamentally, we disagree in two respects with the reasons given for the class action’s predicted demise. First, events have not borne out the assumption that courts would uphold class arbitration waivers across the board.<sup>16</sup> We admittedly have the benefit of several more years of legal development, and thus have been able to observe an increasing number of

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franchise contracts—i.e., contracts between motor vehicle manufacturers and dealers; see Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a); and (3) the proposed Arbitration Fairness Act includes franchisees with consumers and employees as parties to be “protected” from pre-dispute arbitration clauses; see Arbitration Fairness Act of 2009, H.R. 1020, 111<sup>th</sup> Cong. § 4 (2009).

<sup>14</sup>Indeed, class action filings in the studied federal court districts (which accounted for 98% of federal civil filings) increased from 1370 for the six months from July to December 2001 to 2354 for the six months from January to June 2007. Emery G. Lee III & Thomas E. Willing, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, Federal Judicial Center 3 (Apr. 2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf). Those numbers compare to just over 500 class actions filed for the entire year of 1987. See *supra* text accompanying note 3.

<sup>15</sup>A recent report by the Federal Judicial Center found a 72% increase in class action filings in the studied federal court districts from 2001 to 2007. Lee & Willing, *supra* note 14, at 3. Some of the increase in federal court filings no doubt was due to enactment of the Class Action Fairness Act, which shifted at least some class actions from state court to federal court. But ongoing research into California class action filings, both in federal court and state court, has found that “total class action activity” — i.e., combined filings in state and federal court — “increased ... [i]n 2005, the year in which CAFA was enacted.” Emery G. Lee III & Thomas E. Willing, *Progress Report to the Advisory Committee on Civil Rules on the Impact of CAFA on the Federal Courts*, Federal Judicial Center 4-5 (Nov. 2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/\\$file/cafa1107.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/$file/cafa1107.pdf). Certainly a broader sample than one year of filings in California is necessary to draw any definitive conclusions. Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 157 U. PENN. L. REV. 1593, 1609 n.79 (2008). But the more general point holds: that the empirical evidence does not suggest that the demise of the class action is near.

<sup>16</sup>Gilles, *supra* note 5, at 377 (assuming that “the collective action waiver emerges more or less unscathed from the current round of judicial challenges”). To be clear, the point here is that subsequent events have undercut one basis for the predicted demise of the class action, not that the original predictions necessarily were incorrect given the then-current state of the law.

courts holding class arbitration waivers to be unenforceable.<sup>17</sup> But the invalidation of class arbitration waivers alone does not necessarily guarantee the future of the class action. As long as the invalid waiver is severable from the parties' arbitration agreement, the case will still proceed in arbitration—but on a class basis rather than an individual basis. However, an increasing number of franchisors and other parties that draft form contracts now include nonseverability provisions in their arbitration clauses, specifying by contract that if the class arbitration waiver is held invalid, the entire arbitration clause is unenforceable.<sup>18</sup> The result of such a clause, in those jurisdictions holding class arbitration waivers invalid, is that any class claim within the scope of the arbitration clause would proceed as a putative class action in court. Second, not all contracts include arbitration clauses or were likely to do so even before the recent round of court decisions invalidating class arbitration waivers. For those contracts that do not include arbitration clauses, class relief generally remains available in court. This second reason for our conclusion was as true in 2005 as it is today—that the decision of a business (including a franchisor) to include an arbitration clause in a contract is based on a variety of considerations, not only whether it limits the availability of class relief.<sup>19</sup> Thus, we would not expect every contract—or even every consumer or employment contract—to include an arbitration clause.<sup>20</sup> The empirical evidence bears out our belief: less than half of franchise agreements in both 1999 and 2007 include arbitration clauses,<sup>21</sup> and the use of arbitration clauses varies widely across types of consumer and employment contracts.<sup>22</sup> Moreover, the use of arbitration clauses in franchise agreements has remained constant, despite the persistence of class actions brought by franchisees against franchisors.<sup>23</sup>

For these reasons, then, we conclude that arbitration clauses, and the use of class arbitration waivers, are not likely to cause the class action

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<sup>17</sup>See *infra* text accompanying notes 89-97.

<sup>18</sup>Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 108 (2008) (10.7% of franchise arbitration clauses in 2007 included nonseverability provision); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Cases*, 41 U. MICH. J.L. REF. 871, 884 (2008) ("in 60 percent of the consumer contracts that contained mandatory arbitration clauses, companies' standard form contracts deemed those clauses void if the arbitration process allows for class action activity").

<sup>19</sup>Drahozal & Wittrock, *supra* note 18, at 76-78. But see Eisenberg et al., *supra* note 18, at 895-96.

<sup>20</sup>Drahozal & Wittrock, *supra* note 18, at 78-80.

<sup>21</sup>*Id.* at 95.

<sup>22</sup>Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 63-64 (2004).

<sup>23</sup>See, e.g., John F. Dienelt & Margaret E.K. Middleton, *Settling Franchise Class Actions*, 21 FRANCH. L.J. 113, 152 (2002) ("There have already been many franchise class actions and it seems certain that there will be more.").

to become extinct. Although we focus on franchise arbitration, much of what we say has broader application (and we bring in empirical evidence from outside the franchising context when available). Our analysis in the paper proceeds in five parts. Part II provides a brief overview of terminology, distinguishing among “class action waivers,” “class arbitration waivers,” and “collective action waivers.” Part III examines the use of arbitration clauses as a “class action shield”—i.e., to contract out of class relief in court. Part IV considers class arbitration as a substitute for class actions in court. Part V then discusses the use and enforceability of class arbitration waivers. Finally, Part VI examines the future of class actions, in light of party preferences for the means and forum of dispute resolution.

## II. TERMINOLOGY: CLASS ACTION WAIVERS, CLASS ARBITRATION WAIVERS, AND COLLECTIVE ACTION WAIVERS

Courts and commentators use three different phrases to describe contract provisions that may restrict the ability of parties to obtain class relief: class action waivers, class arbitration waivers, and collective action waivers. To make clear how we use those phrases, we begin with some definitions.

“Class Action Waiver” – a provision in a contract by which the parties waive the ability to bring a class action in court. Contracts with forum selection clauses sometimes include provisions waiving class actions,<sup>24</sup> although the legal effectiveness of the provisions is uncertain.<sup>25</sup> An arbitration clause also functions as a class action waiver, as discussed in Part III.<sup>26</sup> Courts sometimes use the phrase “class action waiver” to refer to a clause by which parties agree that any arbitration will proceed only on an

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<sup>24</sup>See *infra* Appendix.

<sup>25</sup>Hans Smit, *Class Actions and Their Waivers in Arbitration*, 15 AM. REV. INT'L ARB. 199, 203 (2004); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181,194 (“Would class action waivers be enforced in court proceedings pursuant to a pre-litigation contract? Those states that find waivers enforceable in the arbitration context are likely to approve it in the courts. The arbitration cases have already determined that class action waivers are not unconscionable under those states' contract law. The courts will explain that they are simply enforcing the parties' agreement. Those states that find such clauses unconscionable in the arbitration setting will likely reach similar conclusions regarding class action waivers for court proceedings – their decisions turn on the importance of the class action as a remedy, and this remains true for court actions.”); see *Dix v. ICT Group, Inc.*, 161 P.3d 1016, 1025 (Wash. 2007) (“Because AOL's forum selection clause precludes class actions for small-value [Consumer Protection Act] claims and there is no feasible alternative avenue for seeking relief on such claims, the forum selection clause is invalid and unenforceable . . .”).

<sup>26</sup>See *infra* text accompanying notes 33-34.

individual and not a class basis.<sup>27</sup> In this article, we limit the meaning of “class action waiver” to contract provisions that preclude class relief in court, and do not include contract provisions that preclude class relief in arbitration (which we refer to as “class arbitration waivers”).

“Class Arbitration Waiver” – a provision in an arbitration clause by which the parties agree that arbitration will not proceed on a class basis.<sup>28</sup> It differs from a class action waiver in that a class arbitration waiver precludes class relief in arbitration, while a class action waiver precludes class relief in court. Referring to such a clause as a “waiver” of class arbitration may be a misnomer. Arbitration is a matter of contract, and parties cannot be required to arbitrate unless they have agreed to do so.<sup>29</sup> By including language limiting the availability of class relief in arbitration, parties are making clear that they have not agreed to class arbitration. Arguably, they are not waiving some otherwise available right, but are defining the scope of their agreement to arbitrate.<sup>30</sup> Nevertheless, because such provisions commonly are called class arbitration waivers, we will use that terminology in this article.

“Collective Action Waiver” – a provision (or provisions) by which the parties waive any ability to proceed on a class basis, either in court or in arbitration.<sup>31</sup> An arbitration clause, which prevents a party to the clause from proceeding in a class action in court, and a class arbitration waiver, which prevents the party from proceeding in a class arbitration, together would act as a collective action waiver.

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<sup>27</sup>See, e.g., *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9<sup>th</sup> Cir. 2008); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 53-54 (1<sup>st</sup> Cir. 2007); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1218 (11<sup>th</sup> Cir. 2007).

<sup>28</sup>For sample clauses, see *infra* Appendix.

<sup>29</sup>E.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986).

<sup>30</sup>Hans Smit takes this point one step further, arguing that if the court or arbitrator enforces the class arbitration waiver the effect of the waiver is to exclude class claims from arbitration and permit the claimant to bring a class action in court. Smit, *supra* note 25, at 209 (“If the conclusion that a waiver of class action in arbitration is intended to operate only in the arbitration is correct, all that the proponents of the waiver end up with is a judicial class action rather than an arbitral one.”); see also Sternlight, *supra* note 9, at 91 (“To the extent a court believes there is ambiguity as to whether a provision prohibiting class actions in arbitration was intended to foreclose class action litigation as well, the ambiguity should be read in favor of the plaintiff and against the drafter to allow for class litigation.”).

<sup>31</sup>Gilles, *supra* note 5, at 375-376. More broadly, a collective action waiver might be a clause that waives not only class relief, but also the ability to join other parties in the case. We do not use the phrase so broadly here, focusing instead on the availability of class relief.

### III. ARBITRATION CLAUSES AS CLASS ACTION WAIVERS

Businesses include arbitration clauses in their standard form contracts, including franchise agreements, for a variety of reasons.<sup>32</sup> One reason, although certainly not the only one, is that the arbitration clause acts as a class action waiver because it precludes the parties to the clause from proceeding on a class basis in court.<sup>33</sup> The rationale is straightforward. Parties who have agreed to arbitrate have, by contract, agreed to have their claims resolved in arbitration instead of in court. Permitting them to participate in a class action in court would circumvent their agreement to arbitrate, contrary to the mandate of the Federal Arbitration Act that arbitration agreements be enforced according to their terms.<sup>34</sup>

Edward Wood Dunham was one of the earliest to have made this point in print. In a 1997 article in the *Franchise Law Journal*,<sup>35</sup> he explained that “[f]ranchisors with an arbitration clause in their franchise agreements have an effective tool for managing these new class action risks.”<sup>36</sup> At the time, franchisors were still reeling from the \$390 million class action judgment in *Broussard v. Meineke Discount Muffler Shops, Inc.*,<sup>37</sup> which was later reversed on appeal.<sup>38</sup> Dunham pointed out that under the then-existing case law, courts typically would not order arbitration on a class basis unless the parties had expressly agreed to class arbitration. As a result, “[t]he franchisor with an arbitration clause should be able to require each franchisee in the potential class to pursue individual claims in a

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<sup>32</sup>See Drahozal & Wittrock, *supra* note 18, at 76-78.

<sup>33</sup>See, e.g., Dienelt & Middleton, *supra* note 23, at 158-59 (describing series of cases that “illustrate how arbitration clauses may be used to diminish drastically the size of the class, and, in some instances, to block class litigation altogether”); Kevin M. Kennedy & Bethany Appleby, Green Tree Financial Corp. v. Bazzle: *A New Day for Class Actions?*, 23 FRANCHISE. L.J. 84, 84 (2003) (“during the past decade, arbitration clauses have repeatedly enabled franchisors to ‘break up’ attempts by franchisees to assert class or consolidated claims”); Robert S. Safi, Note, *Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration*, 83 TEX. L. REV. 1715, 1724 (2005) (“The CAP [class arbitration preclusion clause] is an invention of fairly recent vintage, born of necessity. Historically, defendants could rest assured that a binding arbitration clause buried within the terms of a contract of adhesion would foreclose the possibility of classwide exposure, because courts perceived the class mechanism and arbitration as incompatible.”)

<sup>34</sup>9 U.S.C. §§ 2-4 (2000).

<sup>35</sup>Dunham, *supra* note 11, at 141.

<sup>36</sup>*Id.*

<sup>37</sup>155 F.3d 331, 337 (4th Cir. 1998). Dunham cited *Meineke Mufflers* as “a bracing reminder that franchising is full of potentially catastrophic litigation risks.” Dunham, *supra* note 11, at 141.

<sup>38</sup>*Meineke Mufflers*, 155 F.3d at 331.

separate arbitration.”<sup>39</sup> Dunham concluded: “An arbitration clause may not be an invincible shield against class action litigation, but it is surely one of the strongest pieces of armor available to the franchisor.”<sup>40</sup>

The effectiveness of an arbitration clause as a class action waiver can be seen in *Collins v. International Dairy Queen, Inc.*<sup>41</sup> *Collins* began in 1994 as a federal-court action by six Georgia franchisees of the Dairy Queen® system of quick-service restaurants who asserted antitrust and contract claims against the franchisor. The plaintiffs alleged that they were being overcharged for supplies approved by franchisor American Dairy Queen (ADQ) and sold to franchisees through International Dairy Queen (IDQ), its parent company.<sup>42</sup> Later, other claims were added by amendment, and in 1996—at the suggestion of the district court itself—the named plaintiffs sought certification to represent a class of all Dairy Queen store operators in the United States (except those operating in Texas).<sup>43</sup>

Following certification of the class in August 1996,<sup>44</sup> and denial of the defendants’ summary judgment motion a week later,<sup>45</sup> a major focus of the case became determining which class members’ claims were precluded by their arbitration provisions. The first such order came down in November 1996, as the court modified one of the classes to consist of “Dairy Queen and Dairy Queen/Brazier franchisees in the United States, except those franchisees who are located in the state of Texas and those franchisees who are territorial operators, and *except for those franchisees whose individual franchise agreements provide for arbitration.*”<sup>46</sup> Two months later, the court redefined the classes once again, eliminating additional would-be class members who had arbitration agreements in their franchise agreements.<sup>47</sup> Still other class members—those who were part of a sub-class that claimed breach of a 1974 class action settlement

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<sup>39</sup> Dunham, *supra* note 11, at 141. As an illustration of his argument, Dunham pointed to litigation between Doctor’s Associates and Subway franchisees, in which each of the franchisee class representatives was party to an arbitration clause. *Id.*

<sup>40</sup> *Id.* at 142.

<sup>41</sup> Civil Action No. 94-95-4-MAC(WDO), filed in the United States District Court for the Middle District of Georgia in 1994. For reported decisions in the case, see *infra* notes 42-50.

<sup>42</sup> *Collins v. Int’l Dairy Queen, Inc.*, 939 F. Supp. 875, 878-84 (M.D. Ga. 1996).

<sup>43</sup> *Id.* (Stores in Texas at the time had a somewhat different menu and supply systems, and operators there were not part of the Dairy Queen Operator’s Association, which was funding the *Collins* suit.)

<sup>44</sup> *Collins v. Int’l Dairy Queen, Inc.*, 168 F.R.D. 668, 678 (M.D. Ga. 1996).

<sup>45</sup> *Collins*, 939 F. Supp. At 884.

<sup>46</sup> *Collins v. Int’l Dairy Queen, Inc.*, No. 94-95-MAC (WDO) (unreported decision of Nov. 20, 1996) (on file with the authors) (emphasis added). The Dairy Queen franchise system is one of the oldest such chains in the United States. As such, many of the older franchise agreements (which were perpetual and remained in place) pre-date ADQ’s decision in the 1970s to begin including arbitration provisions in its franchise agreement.

<sup>47</sup> *Collins*, 169 F.R.D. at 694-95.



agreement—were removed by the Georgia court in early 1998 because since 1974, they had signed franchise agreements that required arbitration.<sup>48</sup> Several months later, groups of subfranchisees (those who did not obtain the franchise directly through ADQ but through a “territory operator”/master franchisee instead) were also eliminated if they had agreed to arbitrate “all claims related to” their agreement, as ADQ was found to be a third-party beneficiary of the subfranchise agreement and its arbitration clause.<sup>49</sup> Through these various orders, the court reduced the size of the class by some 2,000 claimants, from over 4,000 to roughly 2,000.<sup>50</sup>

The end result of *Collins*, like most certified class actions, was a class-action settlement agreement.<sup>51</sup> The parties settled for a fraction of the hundreds of millions of dollars sought, with the vast majority of the defendants’ monetary payment (excluding payments to counsel) being made to the Dairy Queen advertising fund.<sup>52</sup> The settlement was seen as a “win-win” for franchisees and franchisor alike because of the increased advertising that would result from the settlement funds.

The pertinent lessons from *Collins* are many. First, the court excluded from the class action all those franchisees whose franchise agreements included arbitration clauses; as to those franchisees, the arbitration clause acted as a waiver of the ability to proceed on a class basis in court. Second, had all franchisees’ agreements contained arbitration clauses, there likely would not have been a class action at all or a class action settlement (given the general unavailability of class arbitration at the time). Third, even the district court judge, who had suggested the class procedure and entered various preliminary rulings against the defendants on substantive issues, acknowledged that binding arbitration provisions trumped the ability to be part of a class action. In short, *Collins* plainly illustrates Dunham’s characterization of the arbitration clause as a “class action shield.”<sup>53</sup>

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<sup>48</sup>*Collins*, 990 F. Supp. at 1473.

<sup>49</sup>*Collins v. Int’l Dairy Queen, Inc.*, 1998 WL 136501, at \*8 (M.D. Ga. 1998).

<sup>50</sup>The defendants also filed an overall motion to “decertify” the class, which the court denied on March 31, 1999. See *Collins v. Int’l Dairy Queen, Inc.*, 186 F.R.D. 689 (M.D. Ga. 1999). Pursuant to then-new Federal Rule of Civil Procedure 23(f), IDQ and ADQ asked for an interlocutory appeal on the class decertification issue. The United States Court of Appeals for the Eleventh Circuit agreed to hear the appeal, but the case settled prior to the appeal being decided.

<sup>51</sup>Class Settlement Agreement, *Collins v. Int’l Dairy Queen, Inc.*, Civil Action No. 94-95-4-MAC(WDO) (M.D. Ga.) (dated Mar. 6, 2000, as clarified Apr. 28, 2000) (on file with the authors).

<sup>52</sup>*Id.* at 27-32.

<sup>53</sup>Dunham, *supra* note 11, at 141.

## IV. CLASS ARBITRATION AS A SUBSTITUTE FOR CLASS ACTIONS

Parties who have agreed to arbitration are not proper parties to a class action in court. But in recent years, the number of arbitrations conducted on a class basis has increased significantly, making class arbitration a possible substitute for class actions.

Prior to the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*,<sup>54</sup> virtually all courts refused to order arbitration to proceed on a class basis unless the parties had expressly agreed to class arbitration.<sup>55</sup> As the Seventh Circuit explained in *Champ v. Siegel Trading Co.*:<sup>56</sup>

The parties' arbitration agreement makes no mention of class arbitration. For a federal court to read such a term into the parties' agreement would "disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration... We thus adopt the rationale of several other circuits and hold that section 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter."<sup>57</sup>

Not surprisingly, arbitration clauses almost never provide for arbitration to proceed on a class basis.<sup>58</sup> As a result, prior to *Bazzle*, arbitration rarely occurred on a class basis.<sup>59</sup>

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<sup>54</sup>539 U.S. 444 (2003).

<sup>55</sup>See, e.g., P. Christine Deruelle & Robert Clayton Roesch, *Gaming the Rigged Class Arbitration Game: How We Got Here and Where We Go Now – Part I*, METROPOLITAN CORP. COUNSEL, Aug. 2007, at 9 ("Prior to *Bazzle*, the Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits had determined that class or consolidated arbitration of claims was improper where the arbitration agreement was silent on the permissibility of such proceedings."); Kennedy & Appleby, *supra* note 33, at 84 ("Before *Green Tree*, whether, under the FAA, a class or consolidated arbitration was available appeared to be an issue for a court, not an arbitrator, to decide. In addition, the clear weight of federal authority held that absent an express agreement of the parties, there could be no class or consolidated arbitrations.").

<sup>56</sup>55 F.3d 269 (7th Cir. 1995).

<sup>57</sup>*Id.* at 275.

<sup>58</sup>In a sample of franchise dispute resolution clauses, two clauses provide for arbitration to proceed on a class basis for a narrow category of claims. See *infra* text accompanying note 82. But see Oral Arg. Tr. 4, *Green Tree Fin. Corp. v. Bazzle*, No. 02-634 (Apr. 22, 2003), available at [www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/02-634.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-634.pdf) (Carter G. Phillips) ("I've never read a class arbitration clause in any contract, and I'm told that no one's ever even attempted to draft a class arbitration clause.").

<sup>59</sup>An exception was California. The California Court of Appeal had ordered arbitration to proceed on a class basis in the well-known *Southland* case. *Keating v. Superior Court*, 645 P.2d 1192, 1209-10 (Cal. 1982), *rev'd on other grounds sub nom*, *Southland*

That was where the law stood when the United States Supreme Court decided *Bazzle*.<sup>60</sup> In *Bazzle*, the Supreme Court granted certiorari to resolve the question “[w]hether the Federal Arbitration Act . . . prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.”<sup>61</sup> In deciding the case, the Court did not reach that question. It issued four separate opinions, none of which commanded a majority.<sup>62</sup> The plurality opinion concluded that the arbitrator, rather than a court, must decide whether the contract (which was silent on class arbitration) permitted arbitration to proceed on a class basis.<sup>63</sup> Because the arbitrator had not yet made such a determination, the Court vacated the judgment below and remanded the case for further proceedings.<sup>64</sup> Justice Stevens concurred in the judgment, but only to ensure that there was a judgment of the Court.<sup>65</sup>

As a legal matter, *Bazzle*’s reach is somewhat uncertain because there was no opinion of the Court.<sup>66</sup> As a practical matter, however, *Bazzle* opened up a whole new arena for claimants seeking to bring class claims. The practice of the American Arbitration Association in response to *Bazzle* is described below, although at least one other arbitration provider, JAMS, has also promulgated rules governing class arbitrations.<sup>67</sup>

Shortly after *Bazzle*, the AAA promulgated Supplementary Rules of Class Arbitration,<sup>68</sup> modeled on the class action provisions of the Federal Rules of Civil Procedure. Under its current policy, the AAA will administer arbitrations on a class basis “if (1) the underlying agreement specifies that disputes arising out of the parties’ agreement shall be resolved by arbitration in accordance with any of the Association’s rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.”<sup>69</sup> If, however, the arbitration agreement “prohibits class claims, consolidation or joinder,” the AAA will not administer a class arbitration

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Corp. v. Keating, 465 U.S. 1 (1984). For a description of several early class arbitrations, see Sternlight, *supra* note 9, at 41 n.149.

<sup>60</sup>Green Tree Fin. Corp. v. Bazzle, 539 U.S. at 444.

<sup>61</sup>Petition for Certiorari, Green Tree Fin. Corp. v. Bazzle, No. 02-634 (Oct. 23, 2002).

<sup>62</sup>*Bazzle*, 539 U.S. at 446.

<sup>63</sup>*Id.* at 453.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* at 455 (Stevens, J., concurring in the judgment and dissenting in part).

<sup>66</sup>See Imre S. Szalai, *The New ADR: Aggregate Dispute Resolution and Green Tree Financial Corp. v. Bazzle*, 41 CAL. W.L. REV. 1, 40-41 (2004).

<sup>67</sup>See JAMS Class Action Procedures (Feb. 2005), available at [http://www.jamsadr.com/rules/class\\_action.asp](http://www.jamsadr.com/rules/class_action.asp). For a description of the controversy over changes in JAMS’ policy toward class arbitration, see Gilles, *supra* note 5, at 411-12.

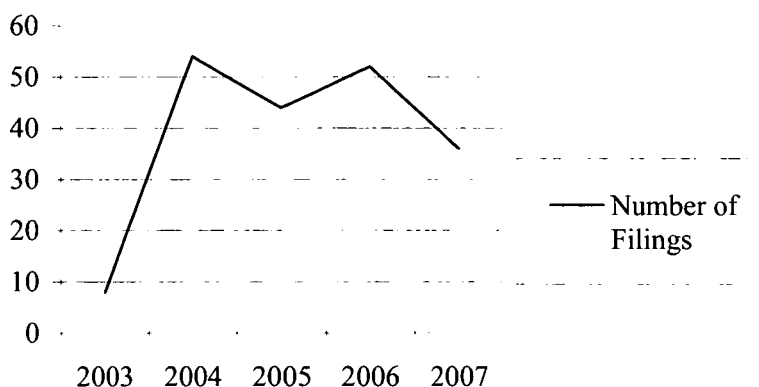
<sup>68</sup>American Arbitration Association, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), available at [www.adr.org/sp.asp?id=21936](http://www.adr.org/sp.asp?id=21936) [hereinafter AAA Class Arbitration Rules].

<sup>69</sup>AAA Policy on Class Arbitrations (July 14, 2005), available at [www.adr.org/sp.asp?id=28779](http://www.adr.org/sp.asp?id=28779).

“unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association.”<sup>70</sup>

Since issuing its class arbitration rules, the AAA has had a steady flow of class arbitration filings. As shown in Figure 1,<sup>71</sup> claimants have filed roughly 50 class arbitration cases per year, although the filings dropped to 36 in 2007. The AAA class arbitration docket includes several franchisors as respondents, including Blimpie International and Snap-On Tools Co.<sup>72</sup> Although the number of class arbitration filings is small when compared to the number of federal court class actions, for some prospective class action claimants, class arbitration provides a possible substitute for class actions.

Figure 1. AAA Class Arbitration Filings



<sup>70</sup>*Id.*

<sup>71</sup>Thanks to Mark Weidemaier providing us with the data on AAA class arbitration filings through early 2007. We collected the data for the rest of 2007 from the Searchable AAA Class Arbitration Docket, <http://www.adr.org/sp.asp?id=25562> (last visited Mar. 12, 2009). The AAA has reported similar, although not identical, data. William K. Slate II & Eric P. Tuchmann, *Class Action Arbitrations*, 11 INT'L ARB. L. REV. 50, 53 (2008) (reporting data “for the period October 8, 2003 through January 1, 2008”) (“Filings by year are as follows: 2003, 6 cases filed; 2004, 65 cases; 2005, 47 cases; 2006, 58 cases; 2007, 41 cases.”).

<sup>72</sup>Searchable AAA Class Arbitration Docket, <http://www.adr.org/sp.asp?id=25562> (last visited May 27, 2008); see Slate & Tuchmann, *supra* note 71, at 53 (“employment and franchise cases are numerically most represented in the current caseload”).

The AAA has reported various characteristics of its class arbitration docket as of January 1, 2008. In addition to the number of cases filed,<sup>73</sup> the AAA reported:

- “Of those class actions that have reached the arbitrator selection stage, 76 are utilizing a single arbitrator and 20 are proceeding with a three-arbitrator panel.”<sup>74</sup>
- “Arbitrators have issued ‘clause construction’ decisions in 71 cases and in three others, the parties have stipulated as to clause construction. Arbitrators have issued ‘class certification’ decisions in 10 cases.”<sup>75</sup>
- “Cases have closed for the following reasons: settled, 54 cases; withdrawn, 16 cases; transferred, 12 cases; consent awards, 3 cases; closed administratively, 6 cases; using a limited service to conclude the case, 1 cases; total awarded, 11 cases though none of the awards was on the merits.”<sup>76</sup>

Little other empirical work has been done on AAA (or other) class arbitrations. One exception is a study of AAA “clause construction awards” by Deruelle and Roesch.<sup>77</sup> “Clause construction awards” are awards that determine whether the parties’ arbitration agreement permits arbitration to proceed on a class basis.<sup>78</sup> Deruelle and Roesch reported that, “[a]s of June 15, 2007, AAA arbitrators have rendered 51 Clause Construction Awards concerning otherwise silent arbitration agreements, and in *all but two* of those decisions, the arbitrators have allowed class wide proceedings.”<sup>79</sup> Thus, when the arbitration clause is silent on the availability of class arbitration, AAA arbitrators have consistently permitted the arbitration to proceed on a class basis.

No published studies have looked at the outcomes of class arbitrations, presumably, because (like class actions in court) most cases are settled. As the AAA has indicated, of the cases on its class arbitration docket, “[n]o case has been awarded on the merits of the dispute.”<sup>80</sup> Obviously, some sort of evaluation would need to be done before the suitability of class arbitration as a substitute for class actions could be determined.

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<sup>73</sup>Slate & Tuchmann, *supra* note 71, at 53.

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* As an example of a final award that was not on the merits, the AAA reported “one instance where the arbitrator determined that the proper jurisdiction for the type [of] relief sought could only be granted by a given state’s attorney general’s office.” *Id.*

<sup>77</sup>Deruelle & Roesch, *supra* note 55, at 9.

<sup>78</sup>AAA Class Arbitration Rules, *supra* note 68, Rule 3.

<sup>79</sup>Deruelle & Roesch, *supra* note 55, at 9.

<sup>80</sup>Slate & Tuchmann, *supra* note 71, at 53.

## V. CONTRACTING AROUND CLASS ARBITRATION

If avoiding class relief is one of the reasons franchisors (and other drafting parties) use arbitration clauses one would expect them to respond to the availability of class arbitration by including a class arbitration waiver in their contract. Indeed, Justice Stevens predicted as much during oral argument in *Bazzele* when he asked: “Does this case have any real future significance, because isn’t it fairly clear that all the arbitration agreements in the future will prohibit class actions?”<sup>81</sup> This part discusses both the extent to which franchisors and other drafting parties include class arbitration waivers in their arbitration clauses, as well as the outcome of legal challenges to the enforceability of such provisions.

*A. The Use of Class Arbitration Waivers*

The use of class arbitration waivers varies depending on the type of contract. Franchisors have modified their arbitration clauses in much the way predicted by Justice Stevens. In 1999, just over 50% (15 of 28, or 53.6%) of franchise arbitration clauses in a sample of franchise dispute resolution clauses included some form of class arbitration waiver.<sup>82</sup> By 2007, almost 80% (22 of 28, or 78.6%) of those arbitration clauses included class arbitration waivers. Table 1 summarizes the clauses.

<b>Table 1. Class Arbitration and Class Action Provisions in Franchise Agreements</b>		
	1999	2007
Class Arbitration Waiver	15 (53.6%)	22 (78.6%)
Waives Class Arbitration	11 (39.3%)	15 (53.6%)
Waives Class Arbitration; Nonseverability Provision	0 (0%)	3 (10.7%)
Waives Class Arbitration; Option	0 (0%)	1 (3.6%)

<sup>81</sup>Oral Arg. Tr. 55, *Green Tree Fin'l Corp. v. Bazzele*, No. 02-634 (Apr. 22, 2003), available at [www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/02-634.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-634.pdf) (Stevens, J.).

<sup>82</sup>*Drahozal & Wittrock, supra* note 18, at 108). (For a description of the sample, see *id.* at 90-94.)

Regarding Provider		
No Joinder or Consolidation	2 (7.1%)	2 (7.1%)
Individual Proceedings Only	2 (7.1%)	1 (3.6%)
Permits Class Arbitration for Specified Type of Claim; Otherwise Waives Class Arbitration	2 (7.1%)	2 (7.1%)
Permits Consolidation and Class Actions in Court, but Waives Class Arbitration	1 (3.6%)	1 (3.6%)
None	10 (35.7%)	3 (10.7%)

By comparison, the use of class arbitration waivers in other standard form contracts is more varied (and evidence on any change over time is lacking). Demaine and Hensler, in their 2004 study of consumer arbitration clauses, found that “[s]ixteen of the fifty-two arbitration clauses (30.8%) explicitly prohibit class actions with the arbitration proceeding, and none of the remaining clauses explicitly provide for class actions.”<sup>83</sup> In 2008, Eisenberg et al. found that 100% (20 of 20) of the consumer contracts they studied (principally credit card and cell phone contracts) included class arbitration waivers.<sup>84</sup> By comparison, none (0 of 13) of the employment contracts (which, given that their source was SEC filings, presumably were employment contracts of corporate executives) and only two of seven (28.6%) of the other “material” contracts in their sample included class arbitration waivers.<sup>85</sup> As a result, Eisenberg et al. concluded, “arbitration clauses seek to completely preclude aggregation of small plaintiff claims into economically viable actions.”<sup>86</sup>

<sup>83</sup>Demaine & Hensler, *supra* note 22, at 65. Mark Weidemaier found a much smaller frequency of class arbitration waivers in a sample of arbitration clauses giving rise to AAA class arbitrations. See W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 85 (2007) (sample of 32 agreements in AAA class arbitrations) (“Of these, 5 of the 16 (31%) of the consumer agreements forbid class actions, but none of the 16 employment agreements contain a similar term.”). The smaller frequency of class arbitration waivers is not surprising, given that the AAA refuses to administer class arbitrations when the arbitration clause includes a class arbitration waiver unless directed to do so by a court. See *supra* text accompanying note 70.

<sup>84</sup>Eisenberg et al., *supra* note 18, at 884.

<sup>85</sup>*Id.*

<sup>86</sup>*Id.* at 896.

By contrast, Florencia Marotta-Wurgler reported that “[n]ot a single EULA [end-user license agreement] out of 597 includes a class-action waiver.”<sup>87</sup> Her conclusion is directly contrary to that of Eisenberg et al.: “Although much analysis remains to be done, these results immediately cast doubt on casual claims that sellers’ rampant use of choice of forum and arbitration clauses deprive buyers of their day in court, or that sellers are shielding themselves from liability by making it impossible for buyers to aggregate low-value claims.”<sup>88</sup>

### *B. The Enforceability of Class Arbitration Waivers*

Courts are divided over the enforceability of class arbitration waivers. As the Washington Supreme Court recently has stated, “[t]here is a clear split of authority.”<sup>89</sup> A number of courts (particularly federal courts) have upheld class arbitration waivers.<sup>90</sup> But an increasing number of courts (particularly state courts) have struck down the provisions<sup>91</sup> (including a pair of cases from the California Court of Appeal that invalidated class arbitration waivers in franchise agreements).<sup>92</sup> These decisions are based

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<sup>87</sup>Florencia Marotta-Wurgler, “*Unfair*” *Dispute Resolution Clauses: Much Ado About Nothing?*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 45, 51 (O. Ben-Shahar ed., 2007).

<sup>88</sup>*Id.*

<sup>89</sup>*Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007).

<sup>90</sup>*Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553 (7th Cir. 2003); *Iberia Credit Bureau v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) (applying Texas law); see *Spann v. American Express Travel Related Services Co.*, 224 S.W.3d 698, 714 (Tenn. Ct. App. 2006) (“with the exception of courts sitting in California, the vast majority of state and federal courts that have considered the question have rejected the argument that class action and class arbitration waiver clauses are unconscionable per se”). At least one state has expressly authorized class arbitration waivers in consumer credit transactions. See UTAH CODE ANN. § 70C-4-105(1)-(2) (“In accordance with this section, a creditor may contract with the debtor of an open-end consumer credit contract for a waiver by the debtor of the right to initiate or participate in a class action related to the open-end consumer credit contract.”) (requiring notice in bold type or all capital letters).

<sup>91</sup>*Scott*, 161 P.3d at 1004 (citing cases); see *infra* text accompanying notes 95-97.

<sup>92</sup>*Independent Ass’n of Mailbox Center Owners, Inc. v. Superior Court*, 34 Cal. Rptr.3d 659, 671 (Cal. Ct. App. 2005) (“it was error not to strike the ban on group arbitration from the JAMS agreement on this record”); *McGuire v. CoolBrands Smoothies Franchise, LLC*, 2007 Cal. App. Unpub. LEXIS 6816, at \*38 (Cal. Ct. App. Aug. 22, 2007) (“We conclude that in the context of adhesive contract involving franchisees, a vulnerable group widely recognized as needing protection, an inherently one-sided provision barring class or consolidated proceedings, whether in arbitration or in the courts, is unconscionable under California law in the absence of evidence establishing otherwise.”).



on several theories—that the waivers were unconscionable,<sup>93</sup> that they precluded the claimants from vindicating their statutory rights,<sup>94</sup> or that they acted as improper exculpatory clauses.<sup>95</sup> Several recent decisions have distinguished between high-value claims and low-value claims, striking down class arbitration waivers only in cases involving the latter.<sup>96</sup> In short, courts have taken diverse approaches.<sup>97</sup>

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<sup>93</sup>*E.g.*, *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 51-52 (1st Cir. 2007) (“Based on the particular facts of this case, we uphold the striking of the class action waiver on grounds of unconscionability”); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986 (9<sup>th</sup> Cir. 2007) (holding class arbitration waiver “unconscionable and unenforceable under California law”); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008) (holding that “the provisions of the arbitration clause [including a prohibition on joinder and class actions], taken together, render it substantively unconscionable because the provisions do not provide plaintiffs with a forum in which they can effectively vindicate their rights”); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1221 (N.M. 2008) (“because there has been such an overwhelming showing of substantive unconscionability,” class arbitration waiver “is unconscionable under New Mexico law”).

<sup>94</sup>*E.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 64 (1st Cir. 2006) (concluding that several provisions in arbitration clause, including class arbitration bar, “would prevent the vindication of statutory rights,” and severing invalid provisions).

<sup>95</sup>*E.g.*, *Scott*, 161 P.3d at 1007-08 (“We ... conclude that since this clause bars any class action, in arbitration or without, it functions to exculpate the drafter from liability for a broad range of undefined wrongful conduct, including potentially intentional wrongful conduct, and that such exculpation clauses are substantively unconscionable.”).

<sup>96</sup>*Muhammad v. County Bank of Rehobeth Beach Delaware*, 912 A.2d 88, 100-01 (N.J. 2006) (“We hold, therefore, that the presence of the class-arbitration waiver in Muhammad’s consumer arbitration agreement renders that agreement unconscionable,” severing invalid class arbitration; “availability of attorneys’ fees ... is not dispositive in the instant case because the damages sought by Muhammad and those she seeks to represent are small”); *Delta Funding Corp. v. Harris*, 912 A.2d 104, 115 (2006) (distinguishing *Muhammad*, *supra*, because “Harris’s claim is not the type of low-value suit that would not be litigated absent the availability of a class proceeding,” citing her “substantial” damages, risk of losing her home, and fact that “all of the statutes under which Harris seeks relief provide for attorneys’ fees and costs to prevailing plaintiffs”); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1221 (11th Cir. 2007) (invalidating class arbitration waiver and distinguishing *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868 (11th Cir. 2005), and *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 819 (11th Cir. 2001), which upheld class arbitration waivers, on ground that “both *Jenkins* and *Randolph* involved claims for which attorneys’ fees and other costs were recoverable”); *Carideo v. Dell, Inc.*, 2007 U.S. Dist. LEXIS 78951, at \*13 (W.D. Wash. Oct. 15, 2007) (upholding class arbitration waiver and distinguishing *Scott v. Cingular Wireless* on ground that “[u]nlike the ‘trivial’ hidden fees of \$1 and \$45 at issue in *Scott*, Plaintiffs allege actual damages between \$1,300 and \$1,700, plus statutory and punitive damages, interest, and attorney’s fees”).

<sup>97</sup>The uncertainty is compounded by new varieties of arbitration clauses that are “designed to make individual arbitration attractive to . . . customers and their attorneys (if any), even when the amount of the claim is modest,” which have not yet been widely litigated. Brief of AT&T Mobility LLC as *Amicus Curiae* in Support of Neither Party

A key unsettled issue is whether the Federal Arbitration Act preempts court decisions finding class arbitration waivers unconscionable. Section 2 of the Federal Arbitration Act makes arbitration clauses “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>98</sup> The Supreme Court has construed the saving clause in section 2 as permitting courts to invalidate arbitration clauses only using “[g]enerally applicable contract defenses.”<sup>99</sup> The doctrine of unconscionability is certainly a defense applicable to contracts generally. The question is whether courts are applying the doctrine to arbitration clauses in a permissible way.<sup>100</sup>

Courts now appear to be divided on the question of whether the FAA preempts state applications of the unconscionability doctrine to arbitration clauses.<sup>101</sup> In *Ting v. AT&T*,<sup>102</sup> the Ninth Circuit held a class arbitration waiver unconscionable and concluded that its holding was not preempted by the FAA.<sup>103</sup> It reasoned that, “[b]ecause unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA.”<sup>104</sup> By contrast, the Third Circuit, in *Gay v. CreditInform*,<sup>105</sup> concluded that Pennsylvania unconscionability decisions were preempted by the FAA, explaining as follows:

[I]t is perfectly obvious that Gay relies on the uniqueness of the arbitration provision in framing her unconscionability argument. . . . [S]he contends that the provision is unconscionable because of what it provides, i.e., arbitration of disputes on an individual basis in place of litigation possibly brought on a class action basis. Thus, with all due respect to the Pennsylvania Superior Court, we

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15-19, *T-Mobile USA, Inc. v. Laster*, 128 S.Ct. 2500 (2008) (No. 07-976) (describing so-called “third-generation arbitration provisions”).

<sup>98</sup>9 U.S.C. § 2 (2000).

<sup>99</sup>*E.g.*, *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

<sup>100</sup>*See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (dicta) (stating that a court may not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot”); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 n.3 (1996) (dicta) (same). For example, a court could not find an arbitration clause to be unconscionable because it prevents a case from proceeding in court before a jury because all arbitration clauses have that effect. *See* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 410-11 (2004).

<sup>101</sup>*Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219-21 (9th Cir. 2008); *Scott*, 161 P.3d at 1008-09.

<sup>102</sup>319 F.3d 1126 (9th Cir. 2003).

<sup>103</sup>*Id.* at 1150 n.15.

<sup>104</sup>*Id.*

<sup>105</sup>511 F.3d 369 (3d Cir. 2007).

will not apply state law . . . and thereby interfere with the appropriate application of the FAA. The Commerce and Supremacy Clauses of the United States Constitution are implicated here.<sup>106</sup>

So far, the Supreme Court has declined to review the issue.<sup>107</sup> Unless the Supreme Court holds that the FAA preempts state unconscionability doctrine,<sup>108</sup> the diversity of state approaches to the enforceability of class arbitration waivers is likely to persist. In some states, class arbitration waivers will be enforceable, while in others, class arbitration waivers will not be enforceable.

## VI. ARBITRATION AND THE FUTURE OF THE CLASS ACTION

The use of arbitration clauses has changed the legal landscape concerning class actions. But in our view, arbitration clauses have not made class actions into an endangered species for two principal reasons. First, a number of courts have invalidated class arbitration waivers as unconscionable. The result has been the continued filing of class actions in court, because, in at least some cases, both parties to the arbitration agreement preferred class actions over class arbitrations. Second, the use of pre-dispute arbitration clauses varies widely in different types of contracts. So long as not all contracts include arbitration clauses, and there is no indication that they will, class actions will continue to be brought in court.

### A. Class Arbitration Waivers and Nonseverability Provisions

An increasing number of courts have held that class arbitration waivers are unenforceable, as discussed above.<sup>109</sup> The effect of these cases on the future of the class action depends on whether the invalid class arbitration waiver is severable from the rest of the arbitration clause. If the class arbitration waiver is not severable, the invalidity of the waiver will infect the rest of the arbitration clause and invalidate the entire clause. As a

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<sup>106</sup>*Id.* at 395.

<sup>107</sup>*T-Mobile USA, Inc. v. Laster*, 2007 U.S. App. LEXIS 25265 (9<sup>th</sup> Cir. Oct. 16, 2007), *cert. denied*, 128 S.Ct. 2500 (2008); *see also* *Gentry v. Superior Court*, 165 P.3d 556, 569 (Cal. 2007) (“Nor do we accept Circuit City’s argument that a rule invalidating class arbitration waivers discriminates against arbitration clauses in violation of the Federal Arbitration Act”), *cert. denied*, 2008 U.S. LEXIS 3000 (U.S. Mar. 31, 2008) (No. 07-998).

<sup>108</sup>And so long as a federal statute like the Arbitration Fairness Act does not pass. *See supra* note 13. Obviously, if federal law makes pre-dispute arbitration clauses unenforceable in consumer, employment, and franchise contracts the issue of the enforceability of class arbitration waivers essentially becomes moot.

<sup>109</sup>*See supra* text accompanying notes 93-97.

result, the case will proceed in court—possibly as a class action. If the class arbitration waiver is severable, the court will strike the waiver but nonetheless send the case to arbitration. The result is a contract with an arbitration clause that is silent on whether class arbitration is permitted, which likely will result in the arbitration proceeding on a class basis.<sup>110</sup>

Cases on severability typically turn on factors such as the language of the arbitration clause, the number of unenforceable clauses, and the like.<sup>111</sup> One might expect the drafting party to prefer to sever the unenforceable provisions and have the case nonetheless proceed in arbitration. That seems to be the preference of the drafting party in most cases—the exception being cases in which courts hold class arbitration waivers unenforceable.

In a number of recent cases, the drafter of an arbitration clause has opposed severing an invalid class arbitration waiver from the arbitration clause.<sup>112</sup> In such cases, the drafting party asserts—often with the agreement of the nondrafting party—that the entire arbitration clause should be thrown out if the class arbitration waiver is invalidated. In addition, an increasing number of arbitration clauses contain “nonseverability” provisions, which provide that the class arbitration waiver is not severable from the arbitration clause.<sup>113</sup> In a sample of

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<sup>110</sup>See *supra* text accompanying notes 77-79.

<sup>111</sup>E.g., *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005).

<sup>112</sup>*Oestreicher v. Alienware Corp.*, 502 F.Supp. 2d 1061, 1071 (N.D. Cal. 2007) (“Alienware agrees that this case should not be referred to arbitration if the class action waiver is unenforceable.”); *Massie v. Ralphs Grocery Co.*, 2007 Cal. App. Unpub. LEXIS 3818, at \*31-\*32 (Cal. Ct. App. 2007) (“In light of our conclusion that Ralphs’ class action waivers are wholly inconsistent with the reasoning of *Discover Bank . . . and Ralphs’* reiteration of its disinterest in arbitration if it cannot enforce its class action waivers, we need not resolve any question of severance of this or any other provision of the arbitration agreement.”) (emphasis added); *Firchow v. Citibank*, 2007 Cal. App. Unpub. LEXIS 178, at \*35-\*36 (Cal. Ct. App. 2007) (“In the case at bar, however, the trial court found – and both parties agree – the waiver provision permeates the entire purpose of the agreement to arbitrate and cannot be severed.”) (emphasis added); *Kinkel v. Cingular Wireless*, 857 N.E.2d 250, 276 (Ill. 2006) (“Cingular argues that the appellate court erred by severing the class action waiver from the remainder of the arbitration clause.”) (emphasis added); *Scott*, 161 P.3d at 1009 (Wash. 2007) (“By its terms, the class action waiver is not severable from the arbitration clause. . . . Because no party argues for severability, we enforce the language of the agreement between the parties and conclude that the entirety of the arbitration clause is null and void.”) (emphasis added). But see *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 63 (1st Cir. 2007) (“At oral argument we asked the parties whether each would prefer to be in arbitration even if the class action waiver clause was stricken. The company said it would prefer to be in arbitration; the plaintiffs agreed.”).

<sup>113</sup>*Cohen v. DIRECTV, Inc.*, 48 Cal. Rptr. 3d 813, 815 n.4 (Cal. Ct. App. 2006) (“A court may sever any portion of Section 9 [the dispute resolution clause] that it finds to be unenforceable, except for the prohibition on class or representative arbitration.”); *Parrish v. Cingular Wireless, LLC*, 2005 Cal. App. Unpub. LEXIS 9021, at \*21 (Cal.

franchise arbitration clauses from 2007, three of twenty-eight (or 10.7%) included a nonseverability provision, up from none in 1999. Even more strikingly, 60% of consumer arbitration clauses collected by Eisenberg and Miller in 2007 contained a nonseverability provision.<sup>114</sup>

Such clauses reflect serious reservations about class arbitration by some drafting parties. As franchise lawyer Lewis Goldfarb has stated: “[Class arbitration] leaves defendants with the worst of all worlds—the threat of a class action in a forum without the procedural, evidentiary and appellate protections available through the judicial process.”<sup>115</sup> A number of reasons have been given for this dislike:

- Courts can vacate class arbitration awards, like other arbitration awards, only on limited grounds.<sup>116</sup> Class arbitrations—and class actions—can have high stakes, and drafting parties may prefer the availability of appellate review in such important cases.
- Class arbitration may be significantly more costly than a series of individual arbitrations, “since each of the interim phases related to class—and merits—arbitral awards will carry with them potential burdens relating to discovery, briefing, hearings, and time, money and effort spent in obtaining judicial review at each of the various phases, which will not necessarily be present in individual arbitrations.”<sup>117</sup>
- Parties may feel the need to choose a different arbitrator in class arbitration (i.e., an arbitrator with expertise in aggregate litigation)

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Ct. App. 2005) (“If this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.”); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1003 n.2 (Wash. 2007) (“If this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.”); see Hilary B. Miller, *Arbitration and Class Actions After JAMS’ Flip-Flop*, N.Y.L.J., May 4, 2005, at 4, 7 (“In response to *Bazzle*, many lenders have begun modifying their consumer arbitration clauses to include . . . a severability clause that provides that if the court refuses to enforce the class-action waiver, then the entire arbitration clause is void, and the class action will proceed in court rather than in arbitration.”). For sample provisions, see *infra* Appendix.

<sup>114</sup>Eisenberg et al., *supra* note 18, at 885 table 4.

<sup>115</sup>*Class Actions in Arbitration—An Idea Whose Time Should Pass*, METROPOLITAN CORPORATE COUNSEL, Apr. 2006, at 25 (interview with Lewis Goldfarb); see also Patrick E. Gaas, *The Evolving Unpredictability of Class Arbitration*, FOR THE DEFENSE, June 2005, at 37, 39 (“class arbitration may be worse for the corporate defendant than class action litigation.”); Sternlight, *supra* note 9, at 117-18 (“It is not at all clear, however, that classwide arbitration will be a popular choice.”). But see Smit, *supra* note 25, at 210 (“The class action in arbitration presently offered by the institutions is far preferable, from their point of view, to the judicial class action they will wind up with if their waiver clause is upheld.”).

<sup>116</sup>Deruelle & Roesch, *supra* note 55, at 9 (“[T]he scope of review available for an arbitrator’s ruling is significantly limited.”).

<sup>117</sup>*Id.*

than in individual arbitration (in which the parties could choose an arbitrator with industry expertise, for example).<sup>118</sup>

- At least under AAA procedures, many important filings in class arbitration proceedings—including the identity of the parties, the demand for arbitration, and any awards—are publicly available documents.<sup>119</sup>

The opposition to class arbitration is reflected in the legal literature, with commentators counseling businesses to include nonseverability provisions with their class arbitration waivers.<sup>120</sup>

It may seem surprising that both drafting parties and non-drafting parties would agree that invalid class arbitration waivers should not be severed from otherwise enforceable arbitration clauses. In fact, such an outcome is consistent with a very simple set of underlying preferences. Assume that non-drafting parties (and their lawyers) would most prefer to end up in a class action in court. From their perspective, class arbitration is the second best outcome, while individual arbitration is their least favored choice. Consistent with these preferences, the individual would challenge the enforceability of the class arbitration waiver in court, and argue that an invalid class arbitration waiver is not severable from the arbitration clause.

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<sup>118</sup>*Id.*

<sup>119</sup>AAA Class Arbitration Rules, *supra* note 68, Rule 9(a).

<sup>120</sup>Kathleen M. Scanlon, *Class Arbitration Waivers: The "Severability" Doctrine and Its Consequences*, DISP. RESOL. J., Feb.-Apr. 2007, at 40, 44 ("A practical approach is to include in future arbitration clauses that contain a class arbitration waiver an explicit provision making the entire arbitration clause unenforceable in the event a court strikes the waiver provision. By drafting the agreement in this manner, the parties can eliminate the severability option and avoid the possibility of having to participate in an unwanted class arbitration."); Donald M. Falk & Archis A. Parasharami, *Federal Court Rejects Class Action Waivers in Arbitration Clauses* (Oct. 6, 2006), available at <http://www.mayerbrown.com/news/article.asp?id=3944> ("Businesses would therefore be wise to guard against being forced into class arbitration—which appears far riskier than class litigation—by making clear in their contracts that a class-arbitration waiver is non-severable."); Safi, *supra* note 33, at 1730 ("Companies can still avoid the risk of class arbitration by supplementing a CAP [class action preclusion clause] with a nonseverability provision, such that the entire arbitration clause stands or falls with the CAP."); Gaas, *supra* note 115, at 50 ("[I]nclude anti-severability language in arbitration agreements that state if any part of the arbitration agreement is found unenforceable, the entire arbitration agreement is unenforceable. This will prevent an arbitrator and/or court from compelling class arbitration if the no-class arbitration provision is declared unenforceable."); *The Current State of Class Action Arbitration*, 22 ALTERNATIVES TO HIGH COST LITIG. 63, 68 (2004) ("Kaplinsky also recommended that drafters create an exception to the severability clause in their arbitration agreements 'because, if in fact a court were to hold that the class action waiver is unconscionable, you don't want either a court or an arbitrator to sever that language from your clause. Because then you might end up where *Green Tree* ended up—that is, you then have a silent clause and you might end up in class-wide arbitration.'") (quoting Alan Kaplinsky).

Meanwhile, from the drafting party's perspective, one can assume that individual arbitration is the preferred outcome. But as between class arbitration and class actions, it is certainly plausible for the drafting party to prefer class actions in court. Such an assumption is consistent with the strong dislike that some businesses have for class arbitration.<sup>121</sup> Given these preferences, the drafting party would defend the enforceability of both the arbitration clause and the class arbitration waiver in court. But if the court holds the class arbitration waiver invalid, the drafting party would then oppose severing the waiver from the arbitration clause.

These preferences are illustrated in Table 2. Once a court invalidates the class arbitration waiver (and individual arbitration is no longer an option), class actions in court become the favored option for both parties; the drafting party and the non-drafting party favor a class action over class arbitration.<sup>122</sup>

<b>Table 2. Ex Post Preference Rankings</b>		
	Drafting Party	Non-drafting Party
Individual Arbitration	1	3
Class Arbitration	3	2
Class Action	2	1

The effect of nonseverability provisions (and a more general preference of some drafting parties for class actions over class arbitration) is that when courts invalidate class arbitration waivers, disputes will likely end up as putative class actions in court—even though the parties' contract includes an arbitration clause. Thus, at least in those jurisdictions that have held class arbitration waivers to be unconscionable, class actions are unlikely to become extinct.<sup>123</sup>

### *B. Class Actions and the Choice Between Arbitration and Litigation*

<sup>121</sup>See *supra* text accompanying notes 115-20.

<sup>122</sup>Note that the preferences summarized in Table 2 are ex post preferences—that is, the parties' preferences after the dispute arises. It is reasonable to assume that the drafting party's preferences are consistent before and after a dispute arises, at least in many cases. But the non-drafting party's preferences may be different once a claim has arisen. So, Table 2 should not be construed as indicating that the parties would be better off ex ante without an arbitration clause.

<sup>123</sup>Assuming, of course, that the Supreme Court does not hold that the FAA preempts such unconscionability decisions. See *supra* text accompanying notes 101-08.

*B. Class Actions and the Choice Between Arbitration and Litigation*

Moreover, even in jurisdictions that uphold class arbitration waivers, there is strong reason to believe that class actions will not become extinct. Although an arbitration clause acts as a class action waiver by precluding a case from proceeding in court (whether as a class action or otherwise), the overall effect of arbitration clauses on class actions depends on how widely used arbitration clauses are. If drafting parties do not include arbitration clauses in their contracts, obviously there is no arbitration clause to act as a class action waiver.<sup>124</sup>

The available empirical evidence shows that the use of arbitration clauses varies widely across different types of contracts, as summarized in Table 3. Fewer than half (43.7%) of a sample of franchise agreements included arbitration clauses in 2007.<sup>125</sup> Over 75% (20 of 26) of the consumer contracts studied by Eisenberg et al. contained arbitration clauses.<sup>126</sup> By contrast, Demaine and Hensler found that from 0% to 69.2% of an array of consumer contracts included arbitration clauses in their 2004 study.<sup>127</sup> Of the consumer software license agreements examined by Marotta-Wurgler, only 6.0% contained arbitration clauses.<sup>128</sup> The data on employment contracts likewise is mixed.<sup>129</sup>

<b>Table 3. Use of Pre-Dispute Arbitration Clauses by Type of Contract<sup>130</sup></b>		
Industry	Percentage of Contracts with Arbitration Clause	Sample Size
Consumer – Housing and Home Services	37.1%	n=35
Consumer – Retail Services	30.0%	n=10
Consumer – Transportation	50.0%	n=20

<sup>124</sup>On occasion, drafting parties include class action waivers in contracts that do not include arbitration clauses. Such provisions are relatively rare, however, and we have been unable to find any cases in which they have been enforced. *See supra* note 25.

<sup>125</sup>Drahozal & Wittrock, *supra* note 18, at 95.

<sup>126</sup>Eisenberg et al., *supra* note 18.

<sup>127</sup>Demaine & Hensler, *supra* note 22, at 63 table 2.

<sup>128</sup>Marotta-Wurgler, *supra* note 87, at 60 table 4.4.

<sup>129</sup>Brett A. Smith & Joshua L. Schwarz, *Keeping Lawyers Out of Court? A Survey of the Prevalence of Compulsory Arbitration Agreements in Law Firms*, 7 EMPL. RTS. & EMPLOY. POL'Y J. 183, 197-98 & table 2 (2003) (10% of law firm contracts included arbitration clauses); Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 234 (2006) (41.6% of CEO contracts included arbitration clauses).

<sup>130</sup>This table is an updated and revised version of the table that appears in Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 210-12 (2006).



Consumer – Health Care	35.3%	n=17
Consumer – Food & Entertainment	0%	n=20
Consumer – Travel	13.6%	n=22
Consumer – Financial	69.2%	n=26
Consumer – Financial, Cable, and Cell Phone	76.9%	n=26
Consumer – Software License Agreements	6.0%	n=259
Employment – Law Firms	10.0%	n=200
Employment – CEOs	41.6%	n=375
Franchising	43.7%	n=71

The variations in the use of pre-dispute arbitration clauses across consumer, employment, and franchise contracts makes it very unlikely that arbitration clauses will cause class actions to become extinct.<sup>131</sup> Even if it is the case (as it may well be) that the use of arbitration clauses is positively correlated with the drafting party's risk of being subject to a class action, class actions will continue to be brought unless the use of arbitration clauses increases dramatically.

Professor Gilles argues that if class arbitration waivers are upheld, all businesses will incorporate arbitration clauses into their contracts to preclude class relief. She explains:

But I regard it as inevitable that firms will ultimately act in their in their economic best interests, and those interests dictate that virtually all companies will opt out of exposure to class action liability. Why wouldn't they? Once the waivers gain broader acceptance and recognition, it will become malpractice for corporate counsel not to include such clauses in consumer and other class-action-prone contracts.<sup>132</sup>

And once the use of arbitration clauses (together with class arbitration waivers) becomes ubiquitous, according to Professor Gilles, the class action will disappear.<sup>133</sup>

But the empirical evidence does not support such an assertion. The percentage of the sample of franchise agreements using arbitration clauses was essentially unchanged between 1999 and 2007, decreasing slightly

<sup>131</sup>This is not even considering the fact that the securities arbitration rules exclude claims involved in class actions from securities arbitration proceedings. See FINRA Code of Arbitration Procedure for Consumer Disputes, R. 12204, available at [http://finra.complinet.com/en/display/display.html?rbid=2403&element\\_id=4110](http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4110) (last visited Mar. 13, 2009).

<sup>132</sup>Gilles, *supra* note 5, at 377.

<sup>133</sup>*Id.* at 375.

from 45% to 43.7%.<sup>134</sup> Anecdotal reports suggest that if anything the use of arbitration clauses is falling in recent years.<sup>135</sup> Even before the recent court decisions striking down class arbitration waivers, use of arbitration clauses was mixed, as the data in Table 3 (most of which pre-date the recent court decisions) indicate.

The explanation is straight forward: while an arbitration clause acts as a class action waiver, that is not all it does. A party including an arbitration clause in its contract is specifying a bundle of characteristics of the dispute resolution process, only one of which is the availability of class relief. Parties may prefer arbitration for any number of reasons—including expert decision-making, quicker and cheaper dispute resolution processes, privacy, and so on. Conversely, there are various reasons why parties might not agree to arbitration—such as for disputes likely to involve emergency actions and bet-the-company stakes.<sup>136</sup> As a result, some drafting parties will continue—indeed, have continued—to choose litigation even though arbitration clauses may preclude the availability of class relief. So long as that remains true, class actions will not become extinct.

## VII. CONCLUSION

We take no position on the normative pros and cons of class actions (or class arbitrations) as a means of resolving disputes arising out of consumer, employment, and franchise contracts. Our perspective here is simply a descriptive one: we consider the question of whether arbitration clauses are likely to result in the extinction of the class action.

In our view, the answer is no—arbitration clauses are not likely to result in the extinction of the class action. We reach this conclusion for two main reasons. First, at least some parties that draft standard form contracts prefer class actions to class arbitrations. This preference is illustrated by the growing use of nonseverability provisions, which provide that if the class arbitration waiver is held unenforceable the entire arbitration clause should be stricken. As a result, the recent court decisions invalidating class arbitration waivers will result in the invalidation of arbitration clauses as well, so that the cases will proceed as putative class actions in court.

Second, and more fundamentally, arbitration clauses bundle a variety of characteristics—including but not limited to acting as a class action waiver—into a single means of dispute resolution. Not all drafting parties will agree to arbitration, even if they might prefer individual arbitrations to class actions. The empirical evidence is consistent with this view, as the use of pre-dispute arbitration clauses varies widely in

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<sup>134</sup>Drahozal & Wittrock, *supra* note 18, at 95.

<sup>135</sup>*Id.* at 72-73. The empirical evidence does not support the existence of a flight from arbitration, however, as noted above. *See supra* text accompanying notes 21-23.

<sup>136</sup>Drahozal & Wittrock, *supra* note 18, at 78-80.

consumer, employment, and franchise contracts. So long as not all contracts include arbitration clauses, and we see no evidence suggesting that they will, class actions will not become extinct.

## APPENDIX

**Sample Clauses:  
Class Action Waivers, Class Arbitration Waivers,  
and Nonseverability Provisions***Class Action Waivers***Hungry Howie's Franchise Agreement**

¶ 29. CLASS ACTION SUITS Franchise Owner waives, to the fullest extent permitted by law, the right to bring, or be a class member in, any class action suit relating to any dispute, controversy or claim arising out of [or] related to this Agreement or arising out of any breach or alleged breach of this Agreement.

**Jackson Hewitt, Inc. Franchise Agreement**

¶ 28.7. *No class actions.* You agree that for our Network to function properly, we cannot be burdened with the costs of litigating network-wide disputes. You agree that any dispute between you and us is unique as to its facts, and you shall not institute, join or participate in any class action against us or our Affiliates.

*Class Arbitration Waivers***AAMCO Transmissions, Inc. Franchise Agreement****¶ 28. Mediation and Arbitration. ...**

(b) ... The parties specifically acknowledge and agree that no class action and multiparty claims shall be filed in any such arbitration proceeding pursuant to the terms of this Agreement.

**Computer Renaissance Franchise Agreement**

¶ 17.A. Arbitration. ... Any dispute and any arbitration will be conducted and resolved on an individual basis only and not a class-wide, multiple plaintiff, or similar basis. Any such arbitration proceeding will not be consolidated with any other arbitration proceeding involving other any other person, except for disputes involving affiliates of the parties to such arbitration.

**Taco John's International, Inc. Franchise Agreement**

¶ 17.10 (d) (iii) Arbitration. ... The parties agree that arbitration shall be conducted on an individual basis, except as specifically provided below. The parties agree further that arbitration shall not be conducted on a class-wide basis.

You may commence an arbitration as a claimant together with other franchisees of Taco John's Restaurant franchisees as co-claimants, subject to the following conditions:

(1) the claims of the other franchisees must present issues of fact or law in common with your claims; and

(2) at any time during the conduct of the arbitration, the total number of Taco John's Restaurants owned by the claimants in the arbitration may not exceed fifteen percent (15%) of the total number of franchised Taco John's Restaurants in operation.

You may consolidate any arbitration in which you are the claimant with other arbitrations in which other Taco John's Restaurants franchisees are claimants, subject to the following conditions:

(1) the claims of the other franchisees in the other arbitrations must present issues of fact or law in common with your claims in your arbitration proceeding; and

(2) at any time during the conduct of the consolidated arbitration, the total number of Taco John's Restaurants owned by the claimants in the consolidated arbitration may not exceed fifteen percent (15%) of the total number of franchised Taco John's Restaurants in operation.

If a claim which is subject to arbitration under this Agreement is properly the subject of a class action, then the party making that claim may, in its discretion, elect either to assert it as a single-party claim (as opposed to a claim on behalf of a class) in the arbitration, or to file it as a class action in a court of competent jurisdiction, pursuant to the laws and rules applicable to that court. If the court refuses to allow the matter to proceed as a class action, whether by refusing to certify a class or otherwise, then the party asserting the claim may not pursue it further in court, and if that party wishes to assert the claim further, then the party must submit it to arbitration in accordance with the provisions of this Paragraph 17.10.

*Nonseverability Provisions***ChemDry Franchise Agreement**

¶ 17.F. **Arbitration.** ... HRI and FRANCHISEE agree that arbitration shall be conducted on an individual, not a class-wide basis and that an arbitration proceeding between HRI and FRANCHISEE and their respective affiliates, shareholders, officers, directors, agents, and/or employees shall not be consolidated with any other arbitration proceeding involving HRI and any other person. The parties further agree that if this Paragraph is held by any court, agency or tribunal with competent jurisdiction to be: (a) invalid, (b) contrary to, or (c) in conflict with, any applicable present or future law or regulation, the entire Section 17.F will be deemed null and void.

**SignsNow Franchise Agreement**

17.G. **ARBITRATION.** ... We and you agree that arbitration will be conducted on an individual, not a class-wide, basis and that an arbitration proceeding between us and our affiliates, and our and their respective shareholders, officers directors, agents, and/or employees, and you (and/or your owners, guarantors, affiliates, and/or employees) may not be consolidated with any other arbitration proceeding between us and any other person. **Notwithstanding the foregoing or anything to the contrary in this Section 17.G or Section 17.B, if any court or arbitrator determines that all or any part of the preceding sentence is unenforceable with respect to a dispute that otherwise would be subject to arbitration under this Section 17.G, then all parties agree that this arbitration clause will not apply to that dispute and that such dispute shall be resolved in a judicial proceeding in accordance with this Section 17 (excluding this Section 17.G).**

**Snap-On Tools Standard Franchise Agreement**

**25.B. Arbitration.** ... In the event any provision in this Section 25, other than the prohibition against consolidation, joinder and class action, is determined to be legally invalid or unenforceable under the law applicable in a particular case, then it is the intention of the parties to this Agreement that such provision be deemed inoperative and stricken from this Agreement, and that the remainder of this Section 25, to the extent not legally invalid or unenforceable under applicable law, be enforced as written as if the invalid or unenforceable provision or provisions had not been included in this Section 25. If the prohibition against consolidation, joinder and class action is determined to be legally invalid or unenforceable in a particular case, then it is the intent of the parties that the case shall proceed only in any federal court of competent jurisdiction, or in the event there is no jurisdiction in a federal court, then in that situation only, the case shall proceed in a state court of competent jurisdiction.